[redacted]

United States Supreme Court

Palazzolo v. State of Rhode Island

State of Rhode Island Brief

QUESTIONS PRESENTED

1. Whether an as-applied regulatory takings claim is ripe even when the land owner has: (1) never applied to undertake any activity on the buildable less-regulated, more-valuable portion of the property; (2) never applied to obtain any approval from the agency having initial jurisdiction over the development plan that serves as the basis of his claim of value; (3) nor applied to obtain any approval from the defendant agency for such development.
2. Whether a takings claimant has established deprivation of all economically viable use of his parcel when the claimant can build at least one residence on the property, thereby giving the property itself a fair market value of at least $200,000 (1986 dollars), far in excess of his monetary investment, and when, furthermore, the denied use was not itself economically viable.
3. Whether a land owner possesses the inherent right to fill coastal marshland, regardless of the severity of the adverse environmental and health effects on neighboring property owners and on his own successors, even when a comprehensive state regulatory program substantially restricting such filling in that very kind of coastal marshland predated the land owner's acquisition of the property.

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STATEMENT OF THE CASE

This is a regulatory takings claim brought by Anthony Palazzolo ("Palazzolo") based upon the Rhode Island Coastal Resources Management Council's ("the Coastal Council's") denial of his application to fill all or most of eighteen acres of coastal inter-tidal marshland on a larger piece of property that also includes buildable upland. The State and its Coastal Council defend on ripeness grounds that, *inter alia*, he compromised the record by completely evading the jurisdiction of state public health agencies, he failed to file an application for the whole parcel, and he never filed a true and meaningful application. Palazzolo's challenge also fails substantively since he retains substantial beneficial use and economic value in his property, and the forbidden uses are barred by background principles of state law and would not have been economically viable in any event.

I. THE LAND

The nature of the Palazzolo parcel must be understood for a proper decision. The Atlantic Ocean, beating against the New England shore beyond the shelter of Long Island, has raised up beaches of sand

and a spine of buildable upland running along the shoreline. Behind the barrier of beach and upland are salt marshes and coastal ponds, such as Winnapaug Pond. The nature of the soil, a mucky peat, and tidal inundation render salt marshes unbuildable without massive alteration. Behind the marshes and coastal ponds, the ground rises again to solid upland.

Development in the vicinity of Palazzolo's parcel reflects these natural conditions. The upland ridge between the Misquamicut beachfront and the marshes is readily buildable. Atlantic Avenue runs along this ridge, and private lots with summer cottages radiate from both sides of the roadway. *See* Ex. FF to JJ, S, Tr. 394-95, 659-60. *See also* Test. of Council Director Fugate, RA 36 (development "confined pretty well exclusively to the upland portion or the dry land portion that

immediately abuts [the road]."). Aside from some very minor encroachments, the Winnapaug marshlands on all the pond-side properties remain in their natural unfilled condition.

The Palazzolo site begins on the spine of upland and descends northward from Atlantic Avenue into the salt marshes. The disparity between upland and marsh is evident: Palazzolo's upland acreage is high and dry; by contrast, his marshland is subject to twice-daily tidal flooding and includes substantial portions below mean

high tide. *See* PA A-3; n. 39, *infra.* Ponding in small pools occurs throughout these marshes. PA A-3.

Winnapaug Pond with its marshland serves as a common amenity to all the surrounding upland properties, providing scenic and recreational qualities that underpin premium real estate values for the buildable upland. Test. of Appraiser Coyle, Tr. 382, 389-93; JL1, tab 1 (aerial photograph); CRMP § 330; R.I. Gen. Laws § 46-23-1 (1980 Reenactment). The Pond's salt marshes absorb wastes that would otherwise overwhelm the pond; provide food and shelter for an abundance of recreational and commercial fish and shellfish, which add to the attraction of pond-side living; and, by biologic and chemical processes too complicated to detail here, nourish and balance the pond. More directly, the marshes protect the upland portions of the abutting properties from storm damage and absorb and contain tidal inundation. *See* 1985 Engineer's Report at 4, 6, 7, RA 68.

II. THE POTENTIAL HARM

Salt ponds are fragile mechanisms, with limited ability to absorb wastes. Large areas of the salt ponds are poorly flushed, which makes them valuable as fish and shellfish nurseries, but also particularly susceptible to the twin threats of bacterial contamination and eutrophication.

Bacterial contamination, such as from failing septic systems, has obvious impacts on public health. Eutrophication can kill a pond. Both bacterial

contamination and eutrophication are hazardous to the high-quality economically productive and attractive resources of Winnapaug Pond. Palazzolo's proposals put the Pond at serious risk.

It was to safeguard against such harms, as well as health hazards, flooding and direct habitat destruction, that Rhode Island developed its environmental programs.

III. RHODE ISLAND'S REGULATORY PROGRAMS

From colonial times, by common law and constitution, Rhode Island has protected public rights to tidal wetlands and private property interests long dependant upon these wetlands. Protections included the law of nuisance, *see, e.g., Payne & Butler v. Providence Gas Co.,* 77 A. 145, 152-531 (R.I. 1910) (destruction of shell-fish bed by pollution constitutes nuisance), the public trust doctrine, *see, e.g., Dawson v. Broome*, 53 A. 151, 154-58 (R.I. 1902), and "the right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *Jackvony v. Powel,* 21 A.2d 554, 554-58 (R.I. 1941). More recently, comprehensive regulatory programs codify and derive from these longstanding public protections.

A. Sewage Regulation

1. At the time of Palazzolo's applications. Since 1977, the Rhode Island Department of Environmental Management ("DEM") has reviewed applications for individual sewage disposal systems ("ISDS") (generally, septic tanks) to protect public natural resources and public health. At the time Palazzolo applied to fill the pond, as well as today, an ISDS system could be installed only upon DEM issuance of an ISDS permit, and then only upon DEM inspection.

Obviously, an ISDS is necessary for a habitable dwelling in any area not served by a municipal sewer system.

2. Historical background. Prior to the transfer of regulatory power to the DEM, *see* 1977 R.I. Pub. Laws ch. 182, §§ 2, 16, the Rhode Island Department of Health ("RIDOH") had similar authority over septic systems. 1966 R.I. Pub. Laws ch. 261, § 4 (enacting R.I. Gen. Laws §§ 46-12-3(j) to 46-12-3(k)); *see Annicelli v. Town of South Kingstown*, 463 A.2d 133, 136 (R.I. 1983) (property owner obtaining ISDS permit from RIDOH prior to applying for municipal building permit).

This enactment was, in turn, preceded by a series of regulatory regimes, dating back to the early years of the last century, regulating sewage disposal. *See, e.g., Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). Due to public health concerns, sewage disposal requirements have not been found to constitute takings by the State or by municipal regulation. *See, e.g., Milardo v. Coastal Res.*

Mgmt. Council, 434 A.2d 266, 269 (R.I. 1981) (state denial of ISDS permit not a taking); *Sundin v. Zoning Bd. of Review*, 200 A.2d 459, 461 (R.I. 1964) (delay of development due to lack of adequate sewage disposal not a confiscation).

B. Coastal Regulation

1. **At the time of Palazzolo's applications.** The Coastal Council was created in 1971, 1971 R.I. Pub. Laws ch. 279 (enacting R.I. Gen. Laws §§ 46-23-1 to 46-23-12), as "the principal mechanism for management of the state's coastal resources." R.I. Gen. Laws § 46-23-1 (1970 Reenactment & Supp. 1971). From the start, Rhode Island singled out the coastal zone for comprehensive and coordinated long-range planning and management, R.I. Gen. Laws §§ 46-23-1, 42-23-6(A) (1970 Reenactment & Supp. 1971); s*ee Santini v. Lyons* 448 A.2d 124, 127 (R.I. 1982), and established the Coastal Council as the final arbiter of development in or adjacent to the coastal zone, *after* other agencies provided any necessary preliminary permits.

The Coastal Resources Management Program ("CRMP" or "the Plan") provides that all alterations and projects proposed for tidal waters or areas contiguous to shoreline features shall require a Coastal Council assent (*i.e.*, permit). CRMP § 100.1. Under the Plan, filling in the coastal wetlands themselves is generally prohibited absent a "special exception." *See* CRMP §§ 100, 110 & Table 1, 130. Residential construction is not the basis of such a

"special exception." *See* CRMP § 130; JA 72-73. Upland areas within 200 feet of coastal wetlands, however, are not similarly subject to a prohibition on filling and residential construction. CRMP §§ 100.1(A), Table 1A, 110.1. A landowner may apply for a "variance", which is more freely available. *See* CRMP § 120.

2. Historical background. The General Assembly enacted earlier protections for the "coastal wetlands" of the State in 1965. *See* 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-13 (repealed effective

1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). The Department of Agriculture & Conservation was the permitting body for activities in such areas. A coastal wetland was defined as "any salt marsh bordering on the tidal waters of [Rhode Island], whether or not the tide water reach the littoral areas through natural or artificial water courses, and such uplands contiguous thereto, but extending no more than fifty (50) yards inland therefrom." 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-14, (repealed effective 1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). Uses were restricted to activity that would not be detrimental to the salt marsh. *Id.* § 1 (enacting R.I. Gen. Laws § 2-1-13). The legislature also enacted the "Intertidal Salt Marshes Act," subjecting to criminal penalties any person who "dumps or deposits mud, dirt, or rubbish upon, or who excavates and disturbs the ecology of, intertidal salt marshes or any part of one, without first obtaining a permit." 1965 R.I. Pub. Laws ch. 26, § 1 (paragraph enacting R.I. Gen. Laws § 11-46.1-1).

Even in 1965, coastal regulation was not new to Rhode Island. Enactments dating back to 1876 (and supplanted by the Coastal Council enabling act only in 1971) controlled and managed "the public tide-waters." 1876 R.I. Acts & Resolves ch. 556, §§ 3-4, 7. *See also, e.g.*, R.I. Gen. Laws ch. 118, §§ 3-6, 10-12, 14 (1896); 1918 R.I. Pub. Laws ch. 1669, § 2; 1935 R.I. Pub. Laws ch. 2250, §§ 60, 64; 1939 R.I. Pub. Laws ch. 660, §§ 100, 101.

Although the administering authority varied in these successive statutes, each granted to the respective agency the authority to permit encroachments into the public tide-waters, and prohibited all filling not so permitted. For example, more than a century ago, the Board of Harbor Commissioners was given the "general care and supervision of all the . . . tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein," R.I. Gen. Laws ch. 118, § 10 (1896), including "the depositing of mud, dirt, and other substances" into the public tide-waters, *id.* §11, and any such unauthorized encroachment upon the public tide waters was "deemed to be a public nuisance." *Id.* § 14. "Tide-waters" included "flats," *id.* § 7, as well as open water areas. *Cf.* R.I. Gen. Laws ch. 112, §§ 1, 8-11, 13 (1938), RA 1-3.

Nor did this type of control originate with the advent of the Board of Harbor Commissioners in 1876. Authority over lands lying below the mean high tide line had been actively exercised by the State (or colony) from its earliest settlement. The ultimate foundation of the State's authority over tide-waters is the long

established principle of Rhode Island law that the State holds a fee interest in such lands. *See Dawson*, 53 A. at 156, 157.

IV. OWNERSHIP AND DEVELOPMENT OF THE PARCEL

Palazzolo became owner of the site in 1978. The parcel was owned before then by Shore Gardens, Inc. ("SGI"), which acquired the property in 1959. Almost immediately, SGI recorded with the Town of Westerly a subdivision plat representing eighty individual lots, some of these platted "under the waters of Winnapaug Pond." PA A-3. SGI sold off eleven lots, in six transactions, yielding at least three or four fully built residences. "These [developed] lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land." PA A-2. In 1969, SGI reacquired five of the eleven lots previously deeded out. *Id.* Palazzolo succeeded in ownership to all of SGI's remaining properties in 1978.

V. APPLICATIONS WITH RESPECT TO THE PARCEL

A. The "Harbors & Rivers" Applications

In 1962, 1963, and 1966, SGI made three separate applications to the State Division of Harbors and Rivers for its assent to filling what is now the Palazzolo site.

Tr. 60-61, 124, 182-83. The 1962 and 1963 SGI applications contemplated a general filling of the entire wetlands section of the parcel. *See* Application of March 29, 1962, Ex. M, Tr. 191-93, 196; Application of May 16, 1963, Ex. 14, Tr. 142-43. The earlier SGI application proposed off-shore dredging in the open waters of Winnapaug Pond for the fill material, *see* Ex. M, Tr. 191-93, 196, while the second proposed dredging much closer to shore, if not completely within the marshlands themselves. *See* 1963 Application Ex. 14, Tr. 142-43. The 1966 SGI application contemplated filling in the area closest to Winnapaug Pond for the purported purpose of establishing a beach. Application of April 29, 1966, Ex. 14, Tr. 142-43. The state Department of Natural Resources originally assented to, then, based on their adverse impacts, denied these applications on November 17, 1971. *See* Ex. 14, Tr. 142-43. The Army Corps of Engineers followed suit with respect to SGI's parallel application for a federal permit on November 23, 1971, based largely on adverse environmental impacts. *See* RA 47.

B. The Coastal Council Applications

Palazzolo made two applications to fill the property. These are the subject of this dispute. The 1983 application sought permission to construct a bulkhead on the shore of the pond and to fill the entire eighteen-acre wetlands portion of the parcel. *See* JL1, tab 5; *see also* Tr. 144; Tr. of Hr'g Regarding Coastal Council Applic. File No. 83-3-55 (Aug. 18, 1983), at 23, Ex. DD, Tr. 443-44. The application did not seek to alter the

upland areas, and did not state any purpose for the filling.

The 1983 application, "nearly identical to the application submitted in 1963," PA A-5, was rejected by the Coastal Council. JA 18. A 1985 application to fill the marsh for a beach club, "nearly identical to the 1966 application," PA A-5, was denied by the Coastal Council. *See* JA 24. Palazzolo appealed this denial pursuant to the state administrative procedures act, R.I. Gen. Laws §§ 42-35-1 to 42-35-18 (1984 Reenactment & Supp. 1986), and that appeal was denied by the Superior Court. JA 31-42.

C. Development Potential

1. Buildable upland. There was uncontradicted testimony, accepted by both courts below, that a particular portion of the parcel would have been approved as "at least" a single home-site, PA A-11; PA B-11, with a value (as of 1986) close to $200,000. PA A-13; PA B-9. Moreover, the State's appraisal expert showed that this would have netted greater proceeds, at less risk, than the $55,000 to be realistically hoped for by attempting the expensive and uncertain process of filling and subdividing.

2. Possibility of approval for more. The record shows that another upland area on the parcel might also have been amenable to development with a variance as well. Test. of Council Director Fugate, RA 36-39; Test. of Engineer Clarke, RA 42; supported by maps in evidence showing a rise, see Ex. AA, Tr. 471-72, and high elevations in the area, see Ex. EEE, Tr. 650-51. It remains unclear how many lots the Coastal Council would have approved if Palazzolo had submitted a proper application incorporating the upland sections of his parcel.

IV. THE DECISIONS BELOW

In the 1980s, Palazzolo filed two separate civil actions challenging the State's denials. First, Palazzolo

appealed under the State administrative procedures act resulting in a superior court decision upholding the agency. JA 31-42. Next, Palazzolo brought the instant takings claim in two successive complaints.

A. Superior Court. Presented with Palazzolo's seventy-four-unit residential development scheme, the trial court found that the filling and septic contamination resulting from the plan would constitute a public nuisance, PA B-11, and further ruled that the home-site's land value of $200,000 in 1986 dollars provided "beneficial use of the subject property." PA B-10, *see also* PA B-12 ("plaintiff has not lost all or even a substantial use of the subject property"). Although Palazzolo proceeded solely under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the superior court also found that Palazzolo did not meet the "investment-backed expectations test" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), due to pervasive wetlands regulation known to him when he acquired the property. PA B-12.

B. Supreme Court. The Rhode Island Supreme Court held Palazzolo's claim lacked ripeness because he had failed ever to explore the possibility of developing the upland portions of his parcel. PA A-11. Although the court deemed its ripeness ruling "dispositive of the case," the court also "briefly" discussed the merits. PA A-12. The court explicitly endorsed the finding that the property retained economically viable use, noting that "*at least* one single-family home" could be built. PA A-11 (emphasis supplied). The court found Palazzolo's denominator assertion -- that the seventy-four-lot proposal would

yield $3,150,000 -- to be "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic." PA A-13 n.7. The decision was silent on the trial court's nuisance finding. The court also upheld the finding that Palazzolo's knowledge of the regulatory limitations on his property deprived him of *Penn Central*'s "reasonable investment-backed expectations" for such a development scheme. PA A-18.

SUMMARY OF ARGUMENT

Palazzolo's regulatory takings claim suffers from a multiplicity of dispositive defects. The Rhode Island Supreme Court correctly held that his complaint lacks ripeness on two separate grounds, and accurately explained why, even if ripe, Palazzolo had failed to prove a valid takings claim under this Court's decisions in *Lucas* or *Penn Central*. Moreover, the trial judge's undisturbed finding, not addressed by the Rhode Island Supreme Court, that Palazzolo's development proposal would have constituted a public nuisance, and the existence of other similarly dispositive defenses raised by the State below but not reached by the courts (*i.e.*, state public trust doctrine), confirm the justness and correctness of the judgment of the state courts.

1. Palazzolo's as-applied takings claim lacks ripeness. The minimum requirement for an as-applied takings claim is a "meaningful application" for development that provides the relevant governmental authority with a record for determining both the extent to which development is permitted and the site-specific reasons why any further development would be barred under existing law. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986). Palazzolo's

evasive, vague, incomplete, redundant, and grandiose applications fall far short of that standard. He has created a record that leaves unexplored the full extent of residential development permissible on his entire parcel, and that fails to establish the economic viability of the uses that he claims he was denied. Indeed, never before in the annals of this Court's takings law has a landowner demanded compensation for the government's denial of an application to engage in an activity that was not the subject of his claim for just compensation.

2. Equally lacking in merit is Palazzolo's claim that he has been denied all "economically viable use" of his property, within the meaning of this Court's *per se* takings test set forth in *Lucas*. The undisputed factual finding

of the lower courts is that Palazzolo's parcel retains substantial economic value for residential use of at least $200,000. *See* PA A-12 to 13; PA B-5, B-9. Palazzolo failed to make the applications necessary to determine whether additional upland areas within his parcel may be susceptible to residential development, so the lower courts' judgment is very conservative. The state supreme court also correctly disputed Palazzolo's exaggerated allegations of lost profits of $3,150,000, which were wholly untethered to any realistic assessment of the actual costs of developing the parcel in the manner he proposed. *See* PA A-13 n.7. For that same reason, Palazzolo has failed to establish that any of the specific uses he was denied were themselves "economically viable."

3. The Rhode Island Supreme Court correctly concluded that when Palazzolo acquired the parcel in 1978, an absolute "right to fill wetlands was not part of the title he acquired." PA A-15. Any such inherent

right to fill coastal marshland property is denied by background principles of state law, as expressed in Rhode Island's comprehensive Coastal Resources Management Program ("CRMP"), longstanding common law and constitutional principles regarding public rights in tidal areas, and a series of antecedent regulatory programs. For this reason, Rhode Island's restrictions on Palazzolo's development would not be a taking under *Lucas* even if they had deprived him of all economically viable use of his property.

4. Finally, Palazzolo's newly-discovered reliance on *Penn Central* is misplaced. Not only did Palazzolo fail to raise this argument in the lower courts, but the state courts also correctly explained why, in all events, any such argument would lack merit. Palazzolo lacks the "interference with reasonable investment-backed expectations" needed to sustain such a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). When Palazzolo acquired his property in 1978, he could not possibly have harbored any reasonable expectation that he could develop the property in the manner he subsequently proposed. Not only did the pre-existing law clearly and precisely bar massive filling activities for such purposes, but the State had previously denied virtually identical applications filed by a preceding owner with which Palazzolo was closely affiliated.

ARGUMENT

I. PALAZZOLO'S AS-APPLIED REGULATORY TAKINGS CLAIM WAS NOT RIPE

The threshold premise of Palazzolo's claim of state court error in its ruling is his contention that "'[t]he

type and intensity of development legally permitted' on [his] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 11 (citation omitted). Palazzolo's premise is simply wrong. Although Palazzolo and affiliated entities have made multiple applications to fill coastal wetlands portions of his parcel, s*ee* Argument I.C., *infra*, the intensity of legally permitted development on his parcel is *not* known, let alone "perfectly clear." The failure to file a true and meaningful application is what has compromised this record. The faults in Palazzolo's applications are that they (1) do not ask for permission to build the project he claims he was denied (and thereby evade state procedures and omit essential information), (2) do not contemplate the "whole parcel" of his land, and (3) are redundant and grandiose.

A. Palazzolo Failed to Apply for the Subdivision Proposal He Claims to Have Been Denied

Palazzolo failed to ripen his claim by deliberately obscuring the reasons why he sought to fill the coastal wetlands on his parcel. The applications for

development made by Palazzolo presumed no residential development at all. The first (1983) application was just for permission to fill the entire eighteen-acre wetland of parcel with fill. JA 10. At the Coastal Council, Palazzolo specifically denied any intent to try to construct the very seventy-four-unit residential development that is now the basis of his takings claim. *See* n. 28, *supra*. The second (1985) application was to fill most of the wetland (approximately twelve acres) for what was vaguely described as a project to construct a "beach." JA 25.

Hiding his purpose allowed Palazzolo to achieve four strategic advantages. First, Palazzolo dodged the necessary applications for ISDS and other permits required by state law prior to seeking the Coastal Council's permission to fill the coastal wetlands on his parcel. The permit process for septic systems in coastal wetlands would have clarified the costs of constructing the necessary septic systems (sharply contested at trial, JA 51-55) and removed any lingering doubt as to the "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic," PA A-13 n.7, nature of his subdivision proposal. Second, an administrative record on sewage would have allowed even better documentation of the adverse environmental spillover effects, such as the effects which led to the trial court's undisturbed finding that the proposal would constitute a "public nuisance." PA B-11. Palazzolo would be hard pressed to allege a taking for a permit denial based on sewage hazard to public waters and public health. *See Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926) (no property right exists to discharge sewage into public waters). Third, not seeking permission for the subdivision allowed him to

finesse the "public trust" issue of on whose land he was actually proposing to build. *See* nn. 59, 60, *infra*. Fourth, by leaving the uplands out of his application, but retaining them in the proposal that he claims as his value, Palazzolo is able to imply that the uplands themselves have adequate economic value only as part of a seventy-four lot parcel-wide subdivision scheme. Argument I.B, *infra*. (Here the "whole parcel," *id.*, and "meaningful application" problems converge.)

This maneuver also allowed Palazzolo to claim in the lower courts, and before this Court, "lost value" of $3.15 million, Pet. Br. 41, that is fanciful and unfounded. Now Palazzolo characterizes his takings claim as relying only on the denial of the 1985 "beach" application and not on the 1983 application at all. Pet. Br. 8 n.3-4, 15 n.7. However, in the lower courts, the only subject of his claim of economic deprivation was his plan to fill the entire eighteen acres for an intensive residential subdivision development, and it remains

the central basis of his financial allegations before this Court. Palazzolo has made no record whatsoever as to any economic value of the "beach."

It does not seem unreasonable for the Rhode Island Supreme Court to require that Palazzolo must have at least applied for the development that serves as the subject of his as-applied takings claim.

B. Palazzolo's Applications Exclude His Whole Parcel's Valuable, Dry Upland Areas

"The relevant question . . . is whether the property taken is all, or only a portion of the parcel in question." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993). Palazzolo's applications only address the wetlands portion of his site. *See* JL1, tab 5 (1983 application); Ex. 8, Tr. 67, 330-31 (1985 application). His parcel does not consist only of coastal wetlands, but upland areas as well, and the state wetlands restrictions complained of do *not*

prevent building on upland portions of his parcel. Not only does Palazzolo fail to encompass the whole parcel, but its limit to his highly-regulated wetlands suggests strategic behavior.

Palazzolo made two applications to fill all or substantially all of his coastal wetlands, yet we still do not know the extent of upland, dry portions of his property. Palazzolo acknowledges that at least one portion of his property includes upland, allowing him to build "one single-family home." Pet. Br. 14-15, 18. The record is not sufficient to support Palazzolo's further contention that the Coastal Council would permit "one single-family home and nothing more." Pet. Br. 13. The Supreme Court left open the possibility of more. PA A-11 ("at least" one single family home). Trial court testimony revealed that there might be additional upland portions on Palazzolo's eighteen

acres that would support three or four additional lots. Indeed, the State even proposed an offer of judgment at trial based on testimony suggesting that as many as eight of the lots on the parcel contained developable uplands. *See* Tr. 209-10, 258-60.

What the Coastal Council would conclude if it had an application that allowed it to consider upland portions of the acreage is not, of course, clear. But the very purpose of the judicial ripeness requirement is to allow for those determinations to be made in the first instance by the regulatory agency and not based on judicial speculation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 190-191 (1985).

C. Palazzolo's Filings Were "Exceedingly Grandiose" and Redundant

"[R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986). Despite Palazzolo's suggestions that he has exhausted himself in applications to the point of

futility, in point of fact he applied only for his "beach" and "erosion control," hiding the seventy-four-lot subdivision proposal. Even though Palazzolo never applied for any intermediate use, and even though he avoided any application including his buildable uplands, nevertheless, the record we have just discussed supports the likelihood of some less grandiose beneficial use. Before the possibility of some intermediate use is ruled out, applicants should meet some burden of coming forward in good faith, candidly disclosing their intentions, and using the whole parcel of their property.

To the extent that Palazzolo references or relies on SGI's applications from the 1960s, they add little to his case, having been found to be "nearly identical" with his 1980s applications. Statement of the Case ("Statement") V.B, *supra*. As found by the courts below, the application denials predating his ownership of the property are not proof of futility, but of dramatically inhibited reasonable investment-backed expectations. *See* PA B-12 ("he knew"); PA A-18 ("he had no reasonable investment-backed expectations that he could develop a 74-lot subdivision"); *See* Argument IV, *infra*. Under *Lucas*, since the state supreme court "rested its judgment on ripeness grounds," *Lucas*, 505 U.S. at 1011, the fact that *Palazzolo* "may yet be able to secure permission to build on his property," *id.,* should "preclude review." *Id.*

Our final observation on ripeness is that a court is entitled to congruity between the issue presented on the merits and the issue presented for ripeness determination. If an applicant drastically narrows his argument to achieve a "ripe" question (for instance that mere refusal to allow him to fill wetlands is a taking), that is the question he should address on the merits. Palazzolo tries to fly in under the ripeness radar with just such a narrow claim, and then once in, implicate numerous unripe issues. He cannot have it both ways.

I. Palazzolo's Claim That He Has Been DENIED All "Economically Viable Use" of His Parcel Lacks Merit

Palazzolo's sole argument to the courts below was that the Coastal Council's denial amounted to a *per se*

taking under *Lucas*. Palazzolo, however, cannot establish what *Lucas* requires: that the Coastal Council deprived him of all "economically viable use of his land." 505 U.S. at 1016. First, he cannot show that there is no economically viable use remaining. The parcel was bought for a "total initial investment of $13,000," PA B-12, has a minimum permitted value of $200,000 in 1986 dollars, PA B-5; PA A-12 to A-13, and may be amenable to further development. Statement V.C. That is not an elimination of all (or nearly all) value. Second, Palazzolo cannot show that his proposed uses were themselves "economically viable." Argument II.B, *infra.* A governmental agency cannot be fairly deemed to have denied a landowner

economically viable use if the use denied is not economically viable in the first instance.

A. Palazzolo's Parcel Retains Substantial Economic Value for Residential Use

In *Lucas*, this Court announced a *per se* regulatory takings test applicable only in extreme and "relatively rare" circumstances, 505 U.S. at 1018, when the government by regulation "denies an owner economically viable use of his land." *Id.* at 1016 (citation and internal quotation marks omitted). The Court concluded that only "deprivation of *all* economically feasible use" is the constitutional equivalent of a physical appropriation of the property by the government. *Id.* at 1017 (emphasis supplied). "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his parcel economically idle, he has suffered a taking." *Id.* at 1019 (emphasis supplied). This accorded with earlier

language that regulation can be a taking only when it "totally destroys the economic value of property." *Pennell v. v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

By Palazzolo's own acknowledgment, he can make economically viable use of his parcel. Pet. Br. 13. "[T]he uncontradicted evidence was that [the Coastal Council] . . . *would not* deny [Palazzolo] permission to build one single-family home" on his parcel. *Id.* (emphasis in original). This is certainly "one step short of a complete deprivation" of use, *Lucas*, 505 U.S. at 1019 n.8, indeed, a long step short.

Because of the ripeness problems, *supra*, the record can only suggest that the Coastal Council may permit as many as three or four more upland lots. *See* Argument I.B, *supra*. Having never formally pursued or been denied upland development, Palazzolo cannot fairly contend before this Court that it has been "taken." We have already discussed the "undisputed evidence . . . that had [Palazzolo] developed the upland portion of the site, its value would have been $200,000," PA A-12 to A-13; PA B-5 (trial court finding), and that this was a minimum value for the parcel. PA A-11 ("at least" one home site). It is this Court's long-established practice not to disturb such factual findings when upheld by both lower courts and there is no reason here to doubt the validity of their findings. Whatever the upper limits of economically "productive,"

"beneficial," or "viable" use of Palazzolo's whole parcel may be, there is no serious issue that at least some residential development, possessing substantial value, would be permitted.

To the extent the Court wishes to assess value in terms of a ratio rather than an absolute number, it should consider the problems with Palazzolo's improbable "denominator" of $3,150,000. *See* n.32, *supra*; n.50, *infra*. It may also wish to consider his "total initial investment" in this property of $13,000. PA B-12.

B. Palazzolo Failed to Establish That His Development Uses Were Themselves "Economically Viable"

As we have shown, Argument I.A; nn.32, 34 *supra*, there is also no plausible record to support that Palazzolo's speculative development proposals were "economically viable." The government's appraisal expert ultimately concluded that Palazzolo would have to expend "in excess of four million dollars in construction costs" for a "net overall value of $55,000." JA 101. In what must be deemed an understatement, he described such an undertaking as a "great folly." JA 101. The "beach" proposal fares no better. *See* n.34 & accompanying text, *supra*. In short, no agency or court in these proceedings has ever given the economic viability of Palazzolo's projects the slightest credence, and the record underlying the judicial skepticism is equally damning.

Because Palazzolo has neither established that his property is valueless under the regulations, nor established an economically viable proposal, his claim lacks merit.

III. Palazzolo's CLAIMS aRE BARRED By Restrictions that predate HIS Acquisition

Under *Lucas*, even a regulation that deprives a landowner of all economically viable use is not unconstitutional "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas,* 505 U.S. at 1027. This Court further stated, "[a]ny limitation so severe cannot be newly

legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The Supreme Court of Rhode Island affirmed the trial court's finding that "the right to fill the wetlands was not part of Palazzolo's estate to begin with," PA A-13, and itself found that "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." PA A-15. This is a state law determination entitled to this Court's respect. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (constitutional property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). This determination is also well-founded.

A. Antecedent "Background Principles of State Law" Are Significant Under *Lucas*

Sequence matters. This Court's opinion in *Lucas* referred to limitations on land use that were "*newly* legislated or decreed," 505 U.S. at 1029 (emphasis supplied). (In *Lucas* the acquisition of the property preceded the regulation applied.) *Lucas* distinguished between regulatory action that does and does not "proscribe a productive use that was *previously* permissible under relevant property and nuisance principles." *Id.* at 1029-30 (emphasis supplied). Indeed, the very term "background" in "background principles" has an obvious temporal element, by

focusing on those "social, historical, and other *antecedents* . . . of an event or experience." *Random House Webster's Unabridged Dictionary* 151 (2d ed. 1997) (emphasis supplied). Thus, as an opening proposition, the Rhode Island Supreme Court was plainly correct in rejecting Palazzolo's "argument that the time of acquisition is irrelevant" to regulatory takings analysis. PA A-16. As this Court expressly acknowledged in *Lucas*, common law principles may, "because of changed circumstances or new knowledge . . . make what was previously permissible no longer so." 505 U.S. at 1031 (quoting Restatement (Second) Torts § 827 cmt. g).

Palazzolo's contrary view is based on an erroneous and extreme image of property. According to Palazzolo, allowing background principles of law to change over time would be "Antithetical" to the "History and Structure of the Constitution" because government could "Acquire the Right to Use and Develop Property Without Paying Just Compensation." Pet. Br. 24. Palazzolo's fundamental mistake is his assumption that whenever the government *restricts* a landowner from using his parcel in a particular way the government has, in effect,

acquired the right to use the property in that same manner itself. That is simply not so.

B. The Relevant "Background Principles of State Law" Under *Lucas* Are Not Confined to Those Supplied By Common Law Doctrine

Lucas leaves ambiguous the extent to which "background principles" must derive from the common law, to the complete exclusion of other

sources of law. Before this Court, Palazzolo apparently contends that the only relevant law is the common law of easements and nuisance. *See* Pet. 6. We disagree. We think the better view is that *Lucas* takings can appropriately be limited by other sources of law, particularly (as here) statutory and regulatory provisions that derive from background common law principles.

Certainly, *Lucas* did not foreclose that background principles extend beyond the common law. The majority did not say that the limitation that "inheres in the title itself" cannot be "legislated," but that it could not be "*newly* legislated." 505 U.S. at 1029 (emphasis supplied). The Court also did not refer just to nuisance law, but to relevant background principles "of the State's law of *property*" as well. *Id.* at 1029 (emphasis

supplied). Many sources of law may shape and define private property rights. See nn. 59, 60, *infra* (public

trust doctrine). Certainly no one could seriously maintain that state law grounded in a state's *constitution*, but not in its common law, was irrelevant to the background principles inquiry. *See, e.g.*, R.I. Const. art. 1, § 17 (rights of fishery and shore).

We have no expression by this Court that legal rules based on the common law are superior to those based on statute. After all, "the great office of statutes is to remedy defects in the common law as they developed, and to adopt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). *Cf. United States v. Causby*, 326 U.S. 256, 260 (1945) ("It is ancient doctrine that at common law ownership of land extended to the periphery of the universe. . . . But that doctrine has no place in the modern world.").

Statutes build upon and develop the common law based upon the very "changed circumstances or new information" that this Court acknowledged in *Lucas* could be the legitimate basis of changes in the common law itself. 505 U.S. at 1031 (quoting Restatement (Second) of Torts § 827 cmt. g). Most simply put, "[f]or almost a century now, legislators – with judicial acquiescence – have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis." Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 281 (1996). Thus, "it is particularly misleading to look simply to common-law judicial definitions of nuisance as the basis for modern property rights." *Id.*

The statutes and regulations at issue illustrate this historical relationship. Long before the Rhode Island legislature enacted the Rhode Island Coastal Resources Management Act of 1971, 1971 R.I. Pub. Laws ch. 279, land use development in the coastal marshes was restricted. *See* Section C, *infra*. The 1971 statute, as supplemented by the Coastal Council's Coastal Resources Management Program, simply implemented those longstanding principles in a comprehensive and

consistent fashion. The overlap is plain in this very case: the trial court, found the use Palazzolo claims was taken from him by regulation to be so harmful as to be barred by the state's common law public nuisance doctrine. PA B-11.

C. Under *Lucas*, Background Principles Supplied By State Law Defeat Any Takings Claim

The state supreme court was correct that under Rhode Island law at the time of Palazzolo's purchase "the right to fill wetlands was not part of the title he acquired." PA A-15. The state court properly relied on the comprehensive state coastal management program existing at the time of Palazzolo's acquisition, whose plain terms made clear at that time that state law would bar the massive filling of coastal wetlands he later proposed.

In this case, the constitutional, statutory, and common law pedigree of the state's regulatory program compels the Rhode Island Supreme Court's decision. This is not an instance in which a state has dramatically and suddenly changed law to the frustration of settled expectations of property owners.

As described *supra* Statement III.B, the 1971 statute applied to Palazzolo's parcel in this case is directly traceable to a series of state statutory programs in existence for decades before then, and is even more deeply rooted in state common law and constitutional principles which, throughout Rhode Island's history, restricted the very kind of injurious fill activities Palazzolo sought to undertake. The extent of these historical restrictions shows that filling of coastal wetlands "has long been the source of public concern and the subject of governmental regulation" in Rhode Island. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

First, and most obviously, the trial court below expressly found that Palazzolo's proposed uses would amount to a nuisance under the common law because of the serious harm from such a development. PA B-10, B-11. Interfering with wetlands is clearly subject to the law of nuisance under Rhode Island law. *See Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59-60 (R.I. 1980). *Cf. Payne & Butler v. Providence Gas Co.*, 77 A. 145, 153 (R.I. 1910) (interference with shellfish beds deemed a nuisance); R.I. Gen. Laws ch. 118 § 14 (1896) (fill in navigable waters subject to law of nuisance). Nuisance uses are not compensable. *Mugler v. Kansas*, 123 U.S. 623, 668-69, 670-71 (1887).

Second, layers of state constitutional and common law dramatically restrict filling and other private rights in tidal wetlands. Rhode Island's constitution protects the public's "right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *see Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941); *Clarke v. City of Providence*, 15 A. 763, 765-66 (R.I. 1888). This section was in the state's original 1843 constitution, which incorporated

rights dating back to our Royal Charter of 1663 (granting "our loving subjects . . . liberty . . . upon said coast"). Rhode Island Royal Charter of 1663, *repealed by* R.I. Const. of 1843, *available at* http://www.state.ri.us/rihist/richart.htm. *See also* R.I. Const. art. 1 § 16 (exempting from state takings clause the regulation of tidal wetlands).

These constitutional rights are of such force that the question usually argued is whether the State even has the power under the constitution to authorize private landowners to fill in tidal wetlands. *See, e.g.*, *Jackvony*, 21 A.2d at 556 (public "'rights,' beyond the power of the general assembly to destroy"); *Clarke v. City of Providence*, 15 A. at 764, 765-66. Even in cases where the Rhode Island Supreme Court approved of the State's power to relinquish the public's trust rights, *see, e.g., Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041-44 (R.I. 1995), this has only emphasized that these are not rights belonging to the landowner.

Rights recognized by the common law overlap with those enshrined in the state constitution. Rhode Island endorses the public trust doctrine, *Town of Warren v.*

Thornton-Whitehouse, 740 A.2d 1255, 1259-60 (R.I. 1999), granting the state a fee interest in tidal wetlands. The public trust doctrine has been codified in harbors and rivers laws and regulations, such as was exercised over SGI's 1960's applications. Under both the common law and regulatory practice dating back centuries, Rhode Island law has never recognized full title of riparian owners in tidal lands, and there is no right to fill. *Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902). The State holds the property in public trust, and may give riparian owners permission to fill. *Id.* at 156.

Finally, if a true and meaningful application for a seventy-four-lot subdivision had been filed, it would

have implicated the sewage control authority of the State. Even good and clear title does not confer on a Rhode Island landowner a property right to emit sewage. *Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). These legal doctrines are all underpinned by ancient equitable maxims recognized in Rhode Island: "Sic utere tuo ut alienum non laedas," *Horton v. Old Colony Bill Posting Co*, 90 A. 822, 837 (R.I. 1914), and "salus populi est suprema lex" *R.I. Dep't of Mental Health, Retardation & Hosps. v. R.I. Council 94, AFSCME*, 692 A.2d 318, 325 (R.I. 1997).

The depth, consistency and antiquity of the background principles of state law applicable in this case support the state court's conclusion that those state law principles, carried forward into the regulations complained of, preclude any claim under *Lucas*. Under Rhode Island law, the title that Palazzolo obtained when he acquired the parcel in 1978 did not include the inherent right to develop the property by filling the parcel's coastal wetlands.

IV. *Penn Central*'S ANALYSIS DOES Not Support Palazzolo's Takings Claim

Although Palazzolo expressly confined his takings challenge to his claim of a *per se* taking under *Lucas*, the Rhode Island Supreme Court nevertheless described how Palazzolo would not have succeeded had he relied on the test set forth in *Penn Central*. *See* PA A-17. Under *Penn Central*, the three factors relevant to the judicial inquiry are "the economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The Rhode Island Supreme Court addressed only the "investment-backed expectations" factor, *see* PA A-17, A-18, and concluded that Palazzolo's "lack of reasonable investment-backed expectation is dispositive" of any possible takings claim. PA A-17. The court relied on the trial court's finding to that effect, which was rooted in the further finding that

when Palazzolo acquired the parcel, "there were already regulations in place limiting [his] ability to fill the wetlands for development." *Id.*

In 1978, when Palazzolo acquired the parcel, Rhode Island had in place a comprehensive program for land use management in the coastal areas where Palazzolo's parcel was located. The Coastal Resources Management Program identified, in clear and precise terms, the very kind of property Palazzolo owned and the restrictions necessary on development in such areas based on the sheer fragility of the surrounding ecosystem. *See* Statement III.B; *supra;* PA A-17. There was absolutely no suggestion in the existing regulatory scheme that the kind of massive filling contemplated by either Palazzolo's 1983 or 1985 proposal would be permitted for an intensive residential subdivision, "erosion control," or the so-called "beach."

Wholly apart from the proper scope of "background principles" of law under the *Lucas per se* takings test, there can be no doubt of the validity of the state court's conclusion that such pre-existing legal restrictions can defeat the reasonableness of a landowner's investment backed expectations. *See* PA A-17. The challenged regulatory program preceded his ownership, and

simply made plain what landowners, including Palazzolo, had long known about their limited ability to fill coastal marshland. Indeed, Palazzolo's predecessor corporation, SGI, had sought and been denied permission to do just what he then proposed in nearly identical new filings.

Neither of the other two *Penn Central* factors would support a finding of a taking here. Palazzolo's "economic impact" claim is based on a speculative allegation of lost profits mightily disbelieved by the courts below (*see supra* n.32; Statement VI.B, *supra*). The "character" of the governmental action at issue here, moreover, involves the very kind of governmental action sustained in *Penn Central*. "[T]he [development restriction] neither exploits [Palazzolo's] parcel for [governmental] purposes nor facilitates nor arises from any entrepreneurial operations of the [State]." *Penn Central*, 438 U.S. at 135. "This is no more an appropriation of property by government than is a zoning law . . . ." *Id.*

Indeed, the law challenged in this case provides the very kind of "reciprocity of advantage" (because it "applies to a broad cross section of land") that the *Penn*

Central dissent acknowledged was sufficient to defeat a regulatory takings claim. *See id.* at 147 (Rehnquist, J., dissenting). Palazzolo, like other landowners in the area, has been both benefited and burdened by the development restrictions. All have investment-backed expectations about what can and can not be done in the heavily regulated wetlands. All are to a degree interdependent. By enforcing long-settled state law through the regulatory process, the state protects those expectations, and averts the "tragedy of the commons" that otherwise would threaten the resource with total destruction, to the detriment of everyone, including Palazzolo.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted.

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